

The issues are: (1) whether the Office properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act; and (2) whether the Office properly refused to reopen appellant's claim for reconsideration of the merits on the grounds that her request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On May 7, 2003 appellant, then a 43-year-old nurse, filed a traumatic injury claim alleging that on February 10, 2003 she sustained a lumbar strain and sprained right knee when she was transferring a patient from his wheelchair into his bed. The employing establishment controverted the claim. By decision dated June 13, 2003, the Office denied appellant's claim for the reasons that the evidence was insufficient to establish that the event occurred as alleged and that there was no medical evidence that provided a diagnosis which could be connected to the claimed events.

By letter dated "February 9, 2003" and received by the Office on February 13, 2004, appellant, through her attorney, requested an oral hearing. By decision dated April 14, 2004, the Office denied her request for an oral hearing as it was not filed within 30 days of the June 13, 2003 decision. The Office further denied appellant's request for the reason that the issue in this case can equally well be addressed by requesting reconsideration from the Office and submitting evidence not previously considered that establishes that she sustained an injury as alleged.

By letter dated June 9, 2004 and received on June 17, 2004, appellant requested reconsideration of the June 13, 2003 decision. By decision dated September 15, 2004, the Office denied her request for reconsideration as untimely and failed to establish clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary . . . is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on her claim before a representative of the Secretary."¹ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.² Timeliness of hearings request is governed by 20 C.F.R. § 10.131(a) which provides that timeliness is determined by the postmark on the envelope, if available. Otherwise, the date of the letter should be used.³

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.⁴

¹ 5 U.S.C. § 8124(b)(1).

² *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

³ See *Gloria J. Catchings*, 43 ECAB 242 (1991); *Douglas McLean*, 42 ECAB 759, 761-62 (1991); *William J. Kapfhammer*, 42 ECAB 271, 272-74 (1990).

⁴ *Henry Moreno*, 39 ECAB 475, 482 (1988).

ANALYSIS -- ISSUE 1

In a letter dated “February 9, 2003” and received by the Office on February 13, 2004, appellant appealed the Office’s June 13, 2003 decision. The Board finds that this letter should have been dated “February 9, 2004” and that the wrong year was a typographical error. The envelope which contained her request for a hearing is not of record. However, the Board finds that appellant’s letter, which was not received until February 13, 2004, was dated significantly more than 30 days after the issuance of the June 13, 2003 decision. Thus, the Board finds that her request for a hearing was not timely filed.

As appellant did not request a hearing within 30 days of the June 13, 2003 decision, she is not entitled to a hearing as a matter of right. The Office must then exercise its discretion to determine whether her request for an oral hearing should be granted. In its April 4, 2004 decision, the Office considered the issue involved and found that appellant could pursue it equally well through submitting new, relevant evidence on reconsideration. Therefore, the Office properly exercised its discretion in denying her request for an oral hearing.

LEGAL PRECEDENT -- ISSUE 2

The Office, through regulation, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act.⁵ The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁶ When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office’s final merit decision was in error.⁷ The Office procedures state that the Office will reopen a claimant’s case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant’s application for review shows “clear evidence of error” on the part of the Office.⁸

ANALYSIS -- ISSUE 2

The Office issued its last merit decision in this case on June 13, 2003. In a letter dated June 9, 2004 and received by the Office on June 19, 2004, appellant requested reconsideration. The Office determined that her request was untimely filed. The Board notes that the Office’s procedure manual, Chapter 2.1602.3(b)(1), provides that timeliness for a reconsideration request is determined not by the date the Office receives the request, but by the postmark on the envelope. The procedure manual states that timeliness is thus determined by the postmark on the

⁵ 5 U.S.C. §§ 8101-8193.

⁶ 20 C.F.R. § 10.607 (1999); *see also* Alan G. Williams, 52 ECAB 180 (2000).

⁷ *See Thankamma Mathews*, 44 ECAB 765 (1993).

⁸ *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: “[The Office] will consider an untimely application of reconsideration only if the application demonstrates clear evidence of error on the part of [it] in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.” 20 C.F.R. § 10.607(b) (1999).

envelope, if available and that otherwise the date of the letter itself should be used. The Board notes that the envelope containing the request was not retained in the record and the letter requesting reconsideration was dated June 9, 2004. For this reason, the Board finds that the reconsideration request was timely. Appellant timely filed her request for reconsideration within one year of the June 13, 2003 merit decision and the Office improperly denied her reconsideration request by applying the legal standard reserved for cases where reconsideration is requested after more than one year. Since the Office erroneously reviewed the evidence submitted in support of her reconsideration request under the clear evidence of error standard, the Board will remand the case to the Office for review of the evidence under the proper standard of review for a timely reconsideration request.

CONCLUSION

The Board finds that the Office properly denied appellant's request for an oral hearing as untimely filed. However, the Office improperly considered her request for reconsideration untimely.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 14, 2004 is affirmed. The Office's decision dated September 15, 2004 is set aside and the case is remanded to the Office for further proceedings consistent with this opinion.

Issued: July 1, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member